NONPRECEDENTIAL

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MARY BOEHM,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	CIVIL NO. 1999/0209
CHASE MANHATTAN BANK,	)	
	)	
Defendant	)	
_____	)	

ATTORNEYS:

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MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court upon Defendant Chase Manhattan Bank's Motion to Dismiss or, in the Alternative, for Summary Judgment. For the reasons discussed herein, Defendant's motion will be denied.

I. Background

Plaintiff Mary Boehm sets forth the facts of this case as follows. Boehm owns two cottages, now in shambles, on the beach in Estate Cane Bay. To purchase the property she obtained a loan from Defendant Chase Manhattan Bank ("Chase"), who in turn held a first priority mortgage on the property. To secure its mortgage interest, Chase force-placed an insurance policy on the property benefitting both Chase and Boehm and charged Boehm for the coverage. Then, in September of 1995, Hurricane Marilyn severely damaged the property and rendered it uninhabitable. After the hurricane, Boehm sought to confirm the existence of insurance coverage on the property and to report the damage. When she contacted Chase, Chase denied that coverage existed for the property. Without insurance monies Boehm could not afford to make repairs, and the cottages remained uninhabitable and continued to deteriorate.

In 1997 Boehm completed all loan payments on the property, fulfilling her obligation to Chase. At that time she received miscellaneous documents concerning the property, among which was a Notice of Insurance dated September 29, 1995 stating a coverage amount of $70,000, less a $2000 deductible. Boehm states that "[b]ecause of the disarray of the mail right after the storm, I received the [Notice of Insurance] dated September 29, 1995 after I'd paid off the loan [in 1997]." (Affid. of Mary Boehm at 1.)

According to Boehm, upon receiving the Notice of Insurance in 1997 she again telephoned Chase to inquire about the existence of insurance. She did so several times in 1997 and 1998 and was repeatedly told that insurance coverage did not exist on her property. Boehm finally telephoned resident insurance agent Kreke Corporation and plan administrator Donnelly

Corporation, both named on the Notice of Insurance. In late 1997 Boehm was told for the first time, by Marilyn Kreke of the Kreke Corporation, that hurricane insurance coverage existed on Boehm's property. Chase continues to deny the existence of coverage. (See Answer, at ¶ 8.)

Boehm claims that as a result of the denial of coverage she has lost the use of and the rental income from her property. Boehm further claims that Chase's denial of coverage caused her tortious injury, and that by its actions Chase breached the implied covenant of good faith and fair dealing and the implied covenant, under the mortgage contract, to notify Boehm of coverage. Based upon those assertions, Boehm filed the instant lawsuit for damages alleging that Chase's failure to notify Boehm of insurance coverage was negligent (Count 1), a reckless or intentional disregard of Chase's duties to Boehm (Count 2), and a breach of contract (Count 3).

Chase's version of the facts differs from Boehm's. Chase maintains that Boehm covenanted to give immediate written notice to Chase of any damage or loss to the property, but that she gave no such notice to Chase. Further, according to Chase, Boehm was required under the mortgage agreement to keep all improvements on the property insured against loss by hurricane. Chase states that upon Boehm's failure to do so, Chase opted in 1995 to protect its own interests by securing insurance on the property as it was entitled to do under the mortgage agreement. Chase argues that it was not required to inform Boehm of its purchase of insurance where Plaintiff had breached her covenant to insure improvements.

By its motion now before the Court, Chase makes the following arguments:

(1) that the Court lacks subject matter jurisdiction because there is no diversity jurisdiction where the amount in controversy is less than $75,000;

(2) that Boehm's tort claims are time-barred under the applicable statute of limitations, and that Boehm's breach of contract claim sounds in tort rather than contract and is thus also time-barred;

(3) that Count III of Boehm's Complaint fails to state a claim for breach of contract because the mortgage agreement does not require Chase to purchase insurance on Plaintiff's behalf or to notify Plaintiff if it has done so; and

(4) that even if Chase's Motion to Dismiss is denied on all of the above grounds, Chase is entitled to summary judgment because there exists no genuine issue of material fact with respect to whether Chase notified Boehm of the insurance coverage, a necessary element of each of Boehm's claims.

II. Jurisdiction

Boehm filed the instant case in federal court alleging diversity jurisdiction pursuant to 28 U.S.C. § 1332. Section 1332 states in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs . . . ." Chase contends that the Court lacks jurisdiction over the instant matter because the amount in controversy is at most $70,000, the coverage amount stated in the Notice of Insurance.

"Once challenged, the party invoking federal jurisdiction bears the burden of proving that jurisdiction is proper." Orndorff v. Allstate Insurance Co., 896 F. Supp. 173, 174 (M.D. Pa. 1995). "If the complaint does not contain a demand for an exact monetary amount . . . the court

must make an independent appraisal of the claim and 'after a generous reading of the complaint, arrive at the reasonable value of the rights being litigated.' " The Bachman Co. v. MacDonald, 173 F. Supp.2d 318, 322-23 (E.D. Pa. 2001) (citations omitted). Such appraisal must include the reasonable value of potential compensatory and punitive damages. Id. at 223. A court can dismiss the case for failure to meet the amount in controversy requirement only if there is a legal certainty that the plaintiff cannot recover more than $75,000. See Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997).

In the instant case, Boehm sues not only for lost insurance proceeds, interest and costs, but also for punitive damages, attorney's fees and "any and all other damages the Court deems appropriate." (Complaint at 3.) Where the stated coverage amount for hurricane damage under the disputed policy is $70,000, where compensatory damages may be necessary to redress alleged deterioration to the property resulting from improper denial of the existence of insurance coverage, and where Boehm seeks punitive damages and attorney's fees, the total amount in dispute could well exceed $75,000. Accordingly, the Court is satisfied that the amount in controversy requirement of 28 U.S.C. § 1332 has been met.

III. Standard Governing a Rule 12(b)(6) Motion to Dismiss

With the exception of Chase's arguments for summary judgment, the remainder of Chase's arguments are governed by Fed. R. Civ. P. 12(b)(6). In determining a Rule 12(b)(6) motion to dismiss, "the material allegations of the complaint are taken as admitted," and the

Court must liberally construe the Complaint in Plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citing Fed. R. Civ. P. 8(f) and Conley v. Gibson, 355 U.S. 41 (1957)). All reasonable inferences are drawn in favor of Plaintiff. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). Further, the Court must follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46; Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994).

IV. Statute of Limitations

Chase argues that Counts I and II of Boehm's Complaint alleging negligence and gross negligence must be dismissed for failing to meet the two-year statute of limitations prescribed for tort claims under 5 V.I.C. § 31(5)(A). Chase further asserts that Count III, Boehm's breach of contract claim, sounds in tort rather than contract and is therefore also untimely because it falls outside the § 31(5)(A) period. Chase's argument is based on the premise that any claim by Boehm necessarily arose as a result of destruction caused by Hurricane Marilyn in September of 1995 and, thus, the accrual date of Boehm's claims for statute of limitations purposes is the date the hurricane struck. Boehm filed her lawsuit on December 20, 1999, which Chase points out is more than four years after Hurricane Marilyn hit the Virgin Islands.

Chase is correct that the applicable Virgin Islands statute provides a two-year limitations

period for tort claims. See 5 V.I.C. § 31(5)(A).[1] Under the statute, a tort claim must be brought within two years "after the cause of action shall have accrued." Id. In determining the accrual date of Boehm's tort claims under Virgin Islands law, the "discovery rule" applies. See Joseph v. Hess Oil, 867 F.2d 179, 182 (3d Cir. 1989) (applying the discovery rule to a § 31(5)(A) tort claim); see also In Re Tutu Wells Contamination Litigation, 846 F. Supp. 1243, 1255 (D.V.I. 1993) (applying the discovery rule for injury to property in the Virgin Islands.) Under the discovery rule a cause of action "accrues" when the plaintiff has discovered or, by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997) (citations omitted). In other words, "application of the equitable 'discovery rule' tolls the statute of limitation when the injury or its cause is not immediately evident to the victim." Joseph, 867 F.2d at 182. Accordingly, this Court must determine when Boehm knew or should have known that Chase's denial of the existence of insurance coverage caused Boehm's injury. In re Tutu Wells, 846 F. Supp. at 1255-56.

According to the facts alleged by Boehm, Chase's denial that insurance coverage existed on her property resulted in Boehm's failure to receive insurance monies to repair the damaged property. Thus, the actual injury for which Boehm sues is ultimately her inability to claim insurance proceeds. Neither the hurricane nor Chase's act of denying coverage, then, could have

[1]Despite that Boehm's claims involve alleged injury to real property, her claims are classified as tort claims. See In Re Tutu Wells Contamination Litigation, 846 F. Supp. 1243, 1255 (D.V.I. 1993).

appraised Boehm that she was injured by Chase's actions. Because the disputed policy was force-placed by Chase rather than acquired by Boehm, her only means of learning of the policy was through Chase. Therefore, Boehm had no reason to know that Chase's denial of coverage prevented her recovery of proceeds until she learned that an insurance policy in fact existed for her benefit. Accordingly, it was on the date Boehm received the "Notice of Insurance" from Chase that she possessed facts sufficient to commence the running of the statutory period.[2]

The remaining question, then, is whether Boehm's lawsuit, filed on December 20, 1999, was filed within two years of the date Boehm received the Notice of Insurance naming her as an insured. Unfortunately, the date of Boehm's receipt of the Notice is unclear. Boehm claims she received the Notice of Insurance "in 1997" at the time she paid off her loan. (See Affid. of Mary Boehm at 1.)[3] Assuming that to be true, where Boehm filed her lawsuit on December 20, 1999, Boehm must have received the Notice on or after December 20, 1997 for her claims to be timely. However unlikely this set of facts, the Court may not dismiss the Complaint unless it appears beyond doubt that Boehm can prove *no set of facts* that she received the Notice in the last twelve days of December, 1997. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasis added).

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[2]"The discovery rule does not delay the running of the statute of limitations until a plaintiff is aware of all of the facts necessary to bring its cause of action. Under the discovery rule, a claim accrues upon awareness of *actual injury*, not upon awareness that the injury constitutes a *legal wrong*." Id. at 1125 (emphasis in original). Here, Boehm's awareness arose upon her receipt of some information that a policy existed.

[3]Although the Notice of Insurance is dated September 29, 1995, Boehm maintains that because of the disarray of the mails after the hurricane she did not receive the Notice until 1997. (See Affid. of Mary Boehm at 1.)

Chase has not shown that Boehm cannot so prove. Accordingly, the Court will decline to dismiss Boehm's tort claims for failure to meet the statute of limitations requirements.[4] Because the Court will not dismiss Boehm's tort claims, it need not consider whether Boehm's contract claim properly sounds in tort and therefore falls under the statute of limitations for tort claims.

V. Whether Boehm Failed to State a Contract Claim

Chase next argues that Count III of Boehm's Complaint fails to state a claim for breach of contract. Count III alleges that Chase "breached [its] mortgage agreement with Mary Boehm in failing to notify her that [it] purchased insurance coverage on the property." (Complaint at ¶¶ 17-19.) Chase urges the Court to evaluate the purportedly unambiguous mortgage agreement and to decide, as a matter of law, that there could be no breach of contract because:

> there is nothing in the contract requiring Chase to purchase insurance for the benefit of Plaintiff; and even if Chase chose to do so, there is nothing in the mortgage requiring Chase to notify Plaintiff that it has done so.

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[4]The Court rejects Boehm's argument that the Continuing Torts Doctrine applies to further extend the starting date of the statutory period. Under the law of the Virgin Islands, the court must apply, if applicable, both the Discovery Rule and the Continuing Torts Doctrine in making the date-of-accrual determination. In Re Tutu Wells Contamination Litigation, 909 F. Supp. 980, 984 (D.V.I. 1995). Applying each of these rules individually, a plaintiff's claim begins to accrue at the latest time provided by either rule. Id. The Continuing Torts Doctrine is, however, inapplicable in the instant case in that it applies to temporary rather than permanent injuries. See id. at 987 (providing an in-depth explanation of the doctrine). Boehm's alleged injuries here are permanent in nature. See id. at 990 ("[A] permanent injury arises when the harm resulting from the recurring tortuous conduct will impact the injured party regardless of whether that conduct ceases--that is, the harm is not abatable, temporary or remediable."). Accordingly, the Discovery Rule must govern the accrual date in this case.

(Chase's Motion to Dismiss at 7).

The Court need not analyze the terms of the mortgage agreement to decide the matter. Turning to the facts alleged--taken as true for the purposes of this motion--Boehm asserts that Chase acquired insurance coverage benefitting her and required her to pay for such insurance. (Complaint at ¶ 8; Boehm's Mem. in Opp. at 1; Boehm's Ex. 3.) Chase does not disagree. Chase's own motion reads: "Chase acquired insurance coverage benefitting Plaintiff in 1995, before Hurricane Marilyn struck." (See Chase's Motion to Dismiss at 2.) Further, whether or not chase was required under the mortgage agreement to provide notice to Boehm of the insurance coverage, it did so by letter dated September 29, 1995. (See Boehm's Ex. 3). Boehm did not receive the letter until sometime in 1997. (Affid. of Mary Boehm at 1.) After the hurricane, and still today, Chase denies that coverage existed benefitting Boehm.

As mortgager and mortgagee, there was without question a contractual relationship between Boehm and Chase. Under the Restatement (Second) of Contracts, adopted as law in the Virgin Islands,[5] "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). Good faith is defined as "honesty in fact in the conduct or transaction concerned." Uniform Commercial Code § 1-201(19). Where it appears from the facts that Chase (1) acquired insurance for Boehm's benefit, (2) required Boehm to pay for such insurance, (3) notified

[5]In the absence of local law to the contrary, the American Law Institute's various Restatements of Law are the rules of decision in the Virgin Islands. 1 V.I.C. § 4; Ambrose v. National Foods Discount, 42 V.I. 229, 231-32 (D.V.I. App. Div. 2000).

Boehm of the insurance, albeit with significant delay, and then (4) denied that such insurance ever existed, the Court has no question that Boehm has stated a claim for breach of the implied covenant of good faith and fair dealing. Accordingly, Chase's motion to dismiss Count III will be denied.

VI. Summary Judgment

Chase next argues that even if Chase's 12(b)(6) Motion to Dismiss is denied on all of the above grounds, Chase is entitled to summary judgment because there exists no genuine issue of material fact with respect to whether Chase notified Boehm of the insurance coverage, a necessary element of each of Boehm's claims. (See Notice of Insurance, Boehm's Ex. 3.)

Under Fed. R. Civ. P. 56, a court may grant summary judgment only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute involving a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3d Cir. 1994). The burden of proof for summary judgment lies with the moving party. Adickes v. S.C. Kress & Co., 938 U.S. 144 (1970). A trial court should not act other than with caution in granting summary judgment, and may deny summary judgment where there is reason to believe that the better

course would be to proceed to a full trial. Anderson, 477 U.S. at 254.

It is clear that Chase sent a letter, dated September 29, 1995, and a Notice of Insurance to Boehm. (See Boehm's Ex. 3). It is unclear, however, whether Chase sent the letter in time for Boehm to file a claim under the insurance policy. Further, Chase now denies that coverage ever existed on the property. In light of those inconsistent facts, this Court has no question that there is a genuine dispute of material fact as to whether Chase provided sufficient notice of insurance coverage to Boehm.

VII. Conclusion

For the foregoing reasons, Chase's Motion to Dismiss or, in the Alternative, for Summary Judgment, shall be denied. An appropriate order is attached.

ENTER:

Dated: December ___, 2002

_____
RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:
Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Honorable Geoffrey Barnard, U.S. Magistrate Judge
Scot F. McChain, Esq.

Gregory H. Hodges, Esq.
David J. Comeaux, Esq.